company has no obligation to interconnect with any other backbone provider, would make it the gatekeeper to cyberspace. So long as WorldCom/MCI can deny a new entrant interconnection to its system, it can devalue the entrant's network. This is the case because access to a WorldCom/MCI network will be a prerequisite for doing business as a backbone provider. Without such access, a provider could not offer customers the ubiquitous access to the Internet that they demand.

If the Commission permits this situation to occur, WorldCom/MCI, like the Bell System before it, could deny new entrants the ability to compete, or at a minimum, dictate the terms of that competition, by controlling access to its dominant system. Just as AT&T was able to impose the terms of traffic exchange and compensation on both its own Bell Operating Companies and all other "independent" telephone companies, WorldCom/MCI would be able to quash would-be competitors by denying them access to the Internet sites it controls.

In addition to WorldCom/MCI's ability to deny or condition interconnection because of its dominant market share, Dr. Harris identifies several other barriers to entry. First, with respect to the cost of deploying a backbone network, Dr. Harris shows that "[c]onstructing a national high-speed backbone network costs millions of dollars to pay for transport facilities, a 24-hour network operations center and routers . . . [and requires] a substantial amount of scarce Internet network engineering talent, establishing interconnection agreements with other backbones and the implementation

of billing, customer support, sales and other back-office systems."[49] Such costs limit the number of new competitors.

Second, Dr. Harris shows that the merged entity's control of key NAPs creates yet another barrier to entry. NAP congestion is a growing problem on the Internet.[50] The merger would exacerbate this problem because "[t]he combined company will have even less incentive to devote resources to alleviating the congestion in the NAPs than WorldCom has today as a stand-alone company."[51] In fact "by keeping the NAPs congested, MCI-WorldCom will cause smaller backbones to rely on obtaining private interconnections which will tend to favor the dominant MCI-WorldCom backbone."[52] Therefore, WorldCom's ownership of NAPs will both limit new competition and undermine existing competition.

Third, the merged company could "use its dominant market share in backbone services to try to unilaterally impose proprietary standards for certain types of Internet services."[53] WorldCom and MCI argue that "[m]erger or no merger, ISPs will continue to use compatible systems based on a common communications protocol, TCP/IP . . . to achieve universal connectivity . . . [n]o critic of the merger claims that MCI WorldCom

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[49] Harris Internet Reply Affidavit at 12-13.

[50] *Id.* at 12.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 10.

would move to a closed system."[54] Without an obligation to interconnect, however, and given the potentially devastating effect on competitors, WorldCom/MCI would have the incentive and the ability to ensure that innovative, desired applications worked better when offered entirely "on-net." For example, by altering standards for provisioning such new applications over its dominant system so that those using the merged entity's version of the standards could better "use the Internet for time sensitive, mission-critical business applications or for IP voice telephony or video conferencing,"[55] WorldCom/MCI could tighten its stranglehold on the backbone market.[56] Dr. Harris concludes that "[t]he establishment of these types of proprietary standards could become an enormous barrier to entry into the backbone market."[57]

In sum, the combination of all of these barriers to entry could create a "snow ball or bandwagon effect" that would increase the merged company's domination of the backbone market.[58] As dominance increases, "ISPs, on-line services, content providers, and end use consumers will desire to be 'on-net' with the dominant MCI-WorldCom backbone"[59] and will switch to this backbone in order to avoid a perceived

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[54] Second Joint Reply at 69.

[55] Harris Internet Reply Affidavit at 10.

[56] *Id.* at 10-11.

[57] *Id.* at 11.

[58] *Id.* at 9.

[59] *Id.* at 10.

threat of service degradation.[60] Once this process gathers steam, WorldCom/MCI's dominance will inexorably lead to monopoly.

F. WorldCom and MCI Have Not Rebutted Evidence of the Merger's Serious Competitive Consequences for Internet Providers and Consumers.

The substantial barriers to entry discussed above along with the merged company's dominance of the backbone market would give it the incentive and ability to engage in anticompetitive behavior. As Dr. Harris has explained:

> Today, no player is dominant, and each has an incentive to make efficient interconnections work. If the merger is approved, MCI/WorldCom will no longer have this incentive to cooperate. Instead, its incentives will be to mesh its own separate backbone networks as efficiently as possible, and interconnect with other players only in a manner which promotes its interests without regard for the other companies.[61]

With both the ability and the incentive to engage in anticompetitive conduct, the merged entity "could charge monopolistic interconnection rates, degrade traffic exchanges, or in the extreme, threaten to refuse interconnection."[62]

The most pernicious aspect of this scenario is the fact that WorldCom/MCI could degrade its competitors' services without taking any overt action that would invite

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[60] *Id.* at 9-10.

[61] Harris Internet Affidavit at 26.

[62] *Id.*

enforcement measures. The explosive growth in Internet traffic, which is doubling every three to six months, requires almost continuous augmentation of network capacity, including at interconnection points. Changes in the priorities for and timing of such upgrades could assertedly be justified under any number of business judgment theories such as resource allocation and budgetary constraints. This type of non-action would be very difficult or impossible for government authorities to police, yet even the threat of such conduct would be sufficient for the dominant provider to exercise its market power over competitors.

WorldCom and MCI argue that the merged entity would not engage in these anticompetitive practices because they would result in revenue and market share losses.[63] But any such temporary losses could be minimized "by targeting backbones one at a time where the degraded service would have a small effect on MCI/WorldCom's service, but devastating effects on the service of the smaller backbone."[64] Dr. Harris explains that, "if MCI/WorldCom had a 50% market share and they degraded service with a smaller backbone which had even a 20% market share, MCI/WorldCom's customers would only suffer degradation approximately 20% of the time but the smaller backbone's customers would be degraded approximately 50% of the time."[65] Because it is the network's relative position in the marketplace that matters,

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[63] Second Joint Reply at 77-84.

[64] Harris Internet Affidavit at 27.

[65] *Id.*

WorldCom/MCI would face incentives to engage in such behavior notwithstanding the harm to its own network and customers.

WorldCom and MCI respond that targeting one backbone at a time for service degradation is "a truly bizarre and unreal scenario."[66] In fact, as Drs. Cremer, Rey, and Tirole explain, a policy of "targeted degradation would be quite a sensible policy for WorldCom/MCI"[67]:

> [T]argeted degradation . . . is just one example of the familiar divide-and-conquer strategy. Army generals often prefer to attack a single country rather than several at a time, especially when their opponents do not have congruent objectives. Similarly, a wholesale monopoly supplier facing the threat of backward vertical integration by its customers has an incentive to offer a sweet deal to some of its customers in order to dissuade them from forming a coalition with the other customers to develop an alternative source of supply.[68]

Effectuating targeted degradation not only would be in the merged entity's interests, it would not be difficult. As described above, by merely slowing upgrades to strategic interconnection facilities, WorldCom/MCI could quickly undermine the service quality of a smaller rival.[69] Dr. Harris explains that such a degradation strategy would mean that serial degradation would not "require exquisite timing" as WorldCom and MCI claim, but would "instead occur *de facto* as the result of MCI-WorldCom slowing down

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[66] Second Joint Reply at 83.

[67] Cremer, Rey, and Tirole at 12.

[68] *Id.* (citations omitted).

[69] Harris Internet Reply Affidavit at 6-7.

its continuous upgrade of interconnection capacity with competing backbones," while focusing on keeping its on-net traffic efficiently served.[70] The result would be a loss of market share by a competitor, little impact on WorldCom/MCI customers, and virtually no explicit evidence of anticompetitive conduct on which regulators could base corrective action.[71]

The contention that coordinated activity by other market participants could negate WorldCom/MCI's market power is easily refuted. Dr. Harris shows that the costs of such activity are high, that the dominant player can always act to deter the formation of a buying coalition, and that, in any event, coordinated conduct is unlikely among the intense competitors that characterize the Internet marketplace.[72]

WorldCom's and MCI's argument that if they were to degrade interconnection to rival backbones, these backbones could purchase transit from other backbone providers and thereby avoid any degradation is equally unconvincing. Any potential transit backbone would likely conclude that the provision of transit service was not in its best interest under these circumstances, particularly if it faces interconnection capacity constraints of its own.

The argument that backbones could escape service degradation by the merged entity through multihoming is likewise faulty. As Drs. Cremer, Rey, and Tirole

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[70] *Id.* at 6.

[71] *See id.* at 5-8 for a more detailed explanation of how WorldCom/MCI's serial degradation strategy could take place.

[72] *See id.* at 15-17.

demonstrate, three factors combine to make multihoming an unattractive option for degraded providers. First, the costs involved in multihoming are high – the technical expertise needed to achieve multihoming is substantial and transaction costs increase due to the need for multiple service contracts.[73] Second, WorldCom/MCI could refuse to interconnect with backbones who multihome, or charge higher service rates for these providers. Third, "even if the technological costs induced by multihoming did not exist and even if the dominant network did not overcharge for multihoming [or refuse to interconnect at all], it is not clear that customers would prefer to multihome when the interconnection between the dominant network and a smaller network is degraded."[74] Instead of multihoming, customers likely would simply switch from the degraded provider to WorldCom/MCI and would likely find "on-net" substitutes for any "off-net" resources that they had used in the past.[75] In any event, multihoming does not reliably avoid degradation of the interconnection over which the response to a multihomed customer's Internet query to a site on the WorldCom/MCI backbone would travel.[76]

Dr. Harris also demonstrates that, even if these obstacles were overcome, multihoming "would only reinforce MCI-WorldCom's dominance."[77] As Dr. Harris explains, because WorldCom/MCI would have almost 50 or more percent of the market:

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[73] *See* Harris Internet Reply Affidavit at 17-18.

[74] Cremer, Rey, and Tirole at 13.

[75] *See* Harris Internet Reply Affidavit at 19.

[76] *See id.* at 19-20.

[77] *Id.* at 18.

> ISPs served by MCI-WorldCom would have the smallest incentives to multihome and ISPs not served by MCI-WorldCom would have the strongest incentives to multihome and would likely multihome to MCI-WorldCom. As more new ISPs multihomed to MCI-WorldCom, its traffic and revenue share would increase. Conversely, ISPs served by MCI-WorldCom would have much smaller incentives to multihome to any other backbones and many would chose not to do so.[78]

It follows that multihoming cannot interfere with the merged company's ability to degrade service once it achieves dominance.

WorldCom's and MCI's other claims that there will be no adverse competitive impact from the merger similarly do not withstand analysis:

- *Universal connectivity*: WorldCom and MCI argue that because "no critic of the merger claims that MCI WorldCom would refuse to interconnect with any ISP – which would completely strip MCI WorldCom of the global connectivity its customers demand,"[79] the merged company would not engage in anticompetitive conduct. In fact, it is the requisite of universal connectivity that creates the externality that gives WorldCom/MCI the leverage to act in an anticompetitive fashion. That both they and their competitors would suffer if the merged company acted anticompetitively and undermined global connectivity does not mean that the merged company will not do so. As shown above, the limited adverse impact to the merged company from refusing interconnection and the availability of the strategy of serial degradation give WorldCom/MCI the incentive to exert market power.

- *Peering*: MCI and WorldCom assert that "[p]eering makes sense only when ISPs exchange roughly comparable amounts of traffic and have added approximately the same amount of incremental capacity to their networks as a result of the peering arrangement . . . no critic of the merger claims that any of the requirements in WorldCom's or MCI's current peering policy is unreasonable or inconsistent with the basic nature of a peering relationship – or significantly different from the peering policies of GTE and Sprint."[80] While

[78] *Id.* at 18.

[79] Second Joint Reply at 69.

[80] Second Joint Reply at 71.

this statement may be literally true, it does not allay the concern that, upon achieving market power, the merged entity will use its newfound dominance to degrade interconnection or to require interconnection agreements that are unreasonable. Such agreements could call for above-market rates or include service parameters that are unacceptable.

- *NAPs*: WorldCom and MCI state that the "merger would not increase concentration among owners or operators of NAPs since MCI does not own or operate any NAPs."[81] Again, while this statement may be literally true, it misses the point. GTE does not contend that the merger will increase concentration among owners of NAPs. However, as set forth above, WorldCom's ownership of the country's most critical NAPs would give the merged entity additional leverage to extend its market power even over traffic that does not transit its network. WorldCom/MCI could exploit its influence in the Internet exchange service market by making it difficult for rival backbones to interconnect at the NAPs. Such a strategy would further interfere with these companies' ability to compete.[82]

Ultimately, the merged company's exercise of market power would become a self-reinforcing phenomenon as Internet users, fearing the potential adverse consequences of such anticompetitive actions, would flock to WorldCom/MCI as their backbone of choice. Given the merged entity's ability and incentive to engage in anticompetitive conduct, and the Applicants' failure to meet their burden under *Bell Atlantic/NYNEX* to demonstrate that the merger would not have adverse competitive consequences, the Commission should deny the applications.

[81] Second Joint Reply at 69.

[82] Harris Internet Reply Affidavit at 12.

II. MCI'S "DIVESTITURE" OF CERTAIN INTERNET ASSETS WILL NOT SIGNIFICANTLY DECREASE THE MARKET POWER OF THE MERGED ENTITY.

MCI has recently proposed to spin off a portion of its Internet assets to Cable & Wireless PLC ("Cable & Wireless") in an effort to win regulatory approval of the merger described above. It claims that this "full divestiture"[83] will "clear the way for the Commission to approve the WorldCom-MCI merger,"[84] because "it is clear that this complete divestiture of MCI's backbone business resolves any substantive issue relating to the effect of the merger on the Internet."[85] GTE strongly disagrees.

As detailed below, even a "full divestiture" of MCI's Internet business would not cure the serious competitive concerns created by the merger of WorldCom and MCI because of MCI's integrated, or "main streamed," operations. Worse yet, the MCI proposal is far from such a "full divestiture." It leaves MCI in control of important Internet assets and in a position to retain or quickly recapture the vast majority of its customers. In reality, the proposed transaction is remarkably limited. It spins off only a portion of MCI's customer base and it permits the merged company immediately to market to the supposedly spun-off customers that also have connections to UUNet, ANS, CNS, Verio, or other WorldCom-controlled backbones. Moreover, it permits

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[83] *Ex Parte* Submission of MCI Telecommunications Corporation, "Divestiture of MCI Internet Backbone Business, CC Docket No. 97-211, at 11 (June 3, 1998) ("MCI *Ex Parte*").

[84] *Id.* at 1.

[85] *Id.* at 11.

WorldCom/MCI to market to all of the spun-off customers after only two years. And, it leaves Cable & Wireless dependent on WorldCom and MCI for transport, operations support, back-office functions, and other critical services. Therefore, the Commission can not rely on the proposed spin-off to protect competition.

A. Even a True Divestiture of MCI's Entire Internet Business Would Not Be an Effective Remedy for the Competitive Dangers Posed by the Merged Entity.

No spin-off of MCI's Internet business could protect the backbone market against anti-competitive conduct by the merged entity, even if such a spin-off was the "full divestiture" promised by MCI. This is due to MCI's policy of tightly integrating its Internet business with other aspects of its operations, a practice known as "main streaming." MCI's "main streaming" policy means that its Internet business has few separate customers, personnel,[86] or facilities[87] that could be transferred to another entity. MCI's Internet business shares its customers, sales force, and operational and support staff with other parts of MCI. Its Internet services rely on the same dual-use or multi-use facilities over which its telephony and other non-IP services are provided.

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[86] Any true divestiture would require a massive transfer of personnel, because it would involve transferring resources that account for 20 percent or more of all of the traffic on the Internet. Because MCI's employees supporting Internet services also support many non-IP services, MCI could not merely transfer employees whose responsibilities are limited to the Internet business.

[87] MCI's Internet facilities, in accordance with its policy of main streaming, were not designed to be operated independently. Therefore, if these facilities were transferred, the purchaser would not receive a fully functioning network, but only a smattering of facilities lacking many mission-critical components, which would be retained by MCI.

MCI's overriding approach to marketing and providing its telecommunications services reflects this policy of "main streaming," in that it stresses integrated offerings of voice, data, and Internet-related services. The result of these marketing efforts is a customer base that values MCI as a service provider because of its ability to offer bundled service. GTE believes, for example, that many of MCI's customers, including its ISP customers, receive not only Internet, but a variety of other services from the company, in many cases over integrated access lines that carry IP and non-IP services alike. Because MCI's customers value bundling so highly, and receive efficient service delivery over integrated facilities, any attempt at a true divestiture of the Internet business will fail.

If MCI spins off its Internet business, it will still maintain an ongoing relationship with its customers for a host of other services. Thus, at best, MCI will continue to "share" the customer base of any divested entity. WorldCom, by virtue of its ability to continue to market its services to existing customers that are "shared" with the spun-off business, will be able to exploit these ongoing relationships as well. Because WorldCom/MCI will be able to provide them with all of the services they once received from MCI alone, they will have very strong incentives to discontinue receiving one service from a new entity, and to switch back to the merged company to receive Internet service with the bulk of their other telecommunications services. These customers will likely choose to maintain a relationship with MCI, due to a preexisting relationship, rather than risk acquiring services from an untested provider, for a number of reasons.

First, MCI's customers chose to bundle services because it was economically efficient for them to do so. Therefore, they will have an incentive to maintain these efficiencies by re-bundling services with WorldCom/MCI. Second, any company that purchases the MCI Internet business will find it difficult to match WorldCom/MCI's ability to offer these integrated services, because its ability to do so will depend on WorldCom/MCI's cooperation. Third, MCI's customers are already extensively "pre-wired" into the MCI network, and transferring them to a competitor would involve massive costs and time delays. Consequently, any purchaser will find that it is nearly impossible to compete with the entrenched post-merger entity to win and keep the transferred customers. WorldCom/MCI certainly would not bolster a competitor's ability to compete by aiding in this process unless forced to do so by Commission regulation, and no such regulatory regime would be workable.

For the foregoing reasons, GTE continues to believe that, short of a complete denial or dismissal of WorldCom's and MCI's applications, only the full and effective spin-off of the entire UUNet business could adequately address the serious competitive concerns raised by the merger. Divestiture of UUNet, unlike divestiture of MCI's Internet business, would not involve problems related to the integration of facilities, overlapping personnel, brand name identity, or a customer base with bundled or integrated service offerings. Additionally, because it is readily separable from the rest of WorldCom, a UUNet spin off presents the Commission with a better and simpler solution.

B. Because MCI's Proposed Spin Off Falls Far Short of Even Such an Ineffective Divestiture, Cable & Wireless Has No Chance of Becoming an Effective Competitor in the Internet Backbone Market.

As demonstrated above, even a total divestiture of MCI's Internet assets would not permit the market for backbone services to remain competitive after the merger. MCI's proposed transfer of Internet-related assets to Cable & Wireless falls far short of divesting MCI of its Internet business, and therefore is a completely insufficient solution. The Commission cannot and should not rely on this transaction to cure competitive risks imposed by the merger.

After the proposed spin-off, WorldCom/MCI would still be the dominant provider of backbone services. Under the proposed arrangement, MCI would retain all of it's current consumer and business retail Internet customers. These customers may well represent the majority of MCI's Internet customers in terms of traffic,[88] and will be folded into the merged company's dominant network. But even as to those customers whose Internet service would purportedly be shifted to Cable & Wireless – MCI's 1,300 ISP customers – the proposed spin-off is a sham. MCI has ensured that Cable & Wireless's backbone operations would be completely dependent on WorldCom/MCI's dominant system. Under the proposed spin-off, Cable & Wireless would obtain only certain

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[88] MCI claims that the 1,300 ISP customers represent two-thirds of their Internet-related revenue. This does not, however, mean that these customers represent two-thirds of MCI's Internet traffic. MCI likely provides Internet access service free of charge to customers who contract with it for large volumes of telecommunications services. Traffic, not revenue, is therefore the appropriate measure for determining the dominance of the merged company over the Internet.

"pieces of technology," such as routers and switches, not MCI's entire Internet network. The policy of "main streaming" discussed in the previous section means that the MCI network was not designed to allow its Internet services to be divested from the remainder of its system. Therefore, in order to use the "pieces of technology" that will be transferred, Cable & Wireless will have to depend on MCI's cooperation in sharing its network.[89] In fact, it appears from the MCI *Ex Parte* that Cable & Wireless will be required to contract with MCI to receive all of its "underlying telecommunications transport services," as well as unspecified "additional services," because it will be unable to use the transferred facilities without MCI support. Furthermore, Cable & Wireless will depend on MCI for engineering services, operations support, and back office functions, presumably pursuant to a professional services contract.

Even if Cable & Wireless did not remain dependent on WorldCom and MCI, the merged entity would still be free to market to many of the transferred ISPs notwithstanding the non-compete clause. Specifically, although the proposal supposedly "protects C&W from competition by MCI WorldCom by precluding MCI WorldCom from contracting with any of [the 1,300 ISPs that are covered by the transfer] to provide Internet services for a period of two years," the *Ex Parte* reveals that there is a "limited exception to this non-compete provision [under which] MCI WorldCom is

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[89] While MCI commits to provide transmission capacity to Cable & Wireless on "competitive commercial terms" for two years, *see* MCI *Ex Parte* at 6, there is no basis for concluding that Cable & Wireless can deploy its own backbone in that short period. Nor does Cable & Wireless have any assurance that MCI will continue to offer adequate facilities: the merged company might well choose to put all its new technology in UUNet's network.

permitted to continue to compete for the business of any ISP customer that currently purchases Internet access from WorldCom."[90] Because many of the largest of these 1,300 ISPs have connections to both MCI and WorldCom, the merged company could compete for these customers immediately.

Furthermore, even the ISP customers that do not currently connect to a WorldCom backbone will have strong incentives to rehome to WorldCom/MCI as quickly as they can so they are likely to backslide to the WorldCom/MCI network even without WorldCom marketing. The combination of intense marketing efforts and strong incentives to rehome to MCI will soon result in the merged company regaining control of many of the customers MCI would transfer in the spin off.

The fact that the proposed spin off includes only approximately 50 employees confirms that the preponderance of MCI Internet business functions will remain with MCI. As Scott C. Cleland of Legg Mason asks:

> Is MCI really selling 100% of its backbone business and thus all of its market power? The metrics appear suspicious. Do 50 MCI employees run one-fourth of the world's Internet traffic? It takes UUNet 1,700 employees to run a business with a similar amount of traffic. Put another way, the divested MCI employees would average $4 million in revenue per employee versus $65,000 per UUNet employee – 61 times UUNet's productivity.[91]

A transfer of only 50 employees makes sense when one realizes that MCI has proposed nothing more than a sale and lease back of various Internet-related assets

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[90] MCI *Ex Parte* at 7.

[91] Scott C. Cleland, "WorldCom-MCI Merger Isn't 'Out of the Regulatory Woods' Yet", Part IV of the "Internet Regulation Preview Series," Legg Mason (Jun. 1, 1998).

together with the short-term parking of certain ISP customers with Cable & Wireless that are intentionally left vulnerable to backsliding. MCI will still provide underlying transport services, engineering services, operations support, and back office functions, and within two years will recapture most of its ISP customers. The veracity of this assessment is reflected in the price Cable & Wireless was willing to pay for the spin-off. While GTE's investment bankers value MCI's Internet business at between $4 and $7 billion, Cable & Wireless will pay a mere $625 million. You get what you pay for.[92]

C. The MCI *Ex Parte* Effectively Concedes That the Cable & Wireless Transaction Would Leave MCI's Internet Business Largely Intact.

The information provided in the MCI *Ex Parte* reveals that the proposed spin-off would be wholly ineffective in protecting against anti-competitive behavior by a combined WorldCom/MCI. The *Ex Parte* also contains factual gaps and innuendoes that should alert the Commission to the presence of further problems with MCI's proposal. For example:

- While the *Ex Parte* states that the 1,300 ISPs covered by the transfer represent "[a]pproximately $200 million in revenues," which constitutes "approximately two-thirds of MCI's anticipated Internet revenues for 1998,"[93] nothing is said about the percent of MCI's Internet traffic these customers

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[92] This discussion should not be taken to imply that Cable & Wireless negotiated a bad deal with MCI in purchasing the Internet assets discussed above. GTE estimates that Cable & Wireless will recoup its investment within two years due to revenues earned from former MCI customers. The fact that Cable & Wireless was willing to pay only between one-sixth and one-eleventh of the value of MCI's total Internet assets demonstrates that the company realizes that it will receive only a small fraction of MCI's Internet business as part of the spin off.

[93] *Id.*

represent. In reality, the percent of traffic transferred to Cable & Wireless may be much lower. MCI likely provides Internet access service free of charge to customers who contract with it for large volumes of telecommunications services or may report relevant revenue as non-Internet revenue. Traffic, not revenue, is the appropriate measure for determining the dominance of the merged company over the Internet.

- MCI states that it "has agreed to extend its current peering arrangement with Cable & Wireless on a long-term basis."[94] However, if MCI is truly divesting itself completely of its Internet backbone business, what will Cable & Wireless peer with? The offer of long-term peering is yet another indication that MCI will continue to operate as a backbone provider after the spin off.

- The *Ex Parte* states that MCI will "transfer" the "*right to use*" both "transmission capacity" and "associated dedicated software and operations support software."[95] The Commission should query what this "right to use" means. Does the "right to use" capacity and software merely mean that Cable & Wireless can contract with MCI to receive the use of these items, and that MCI may exact any contract terms or fees for their use, thereby controlling Cable & Wireless's ability to provide Internet service?

- Additionally, MCI grants Cable & Wireless "collocation rights that permit C&W to *maintain* equipment in MCI facilities."[96] Does a right to "maintain" equipment mean only that Cable & Wireless can locate the existing equipment that MCI will transfer to it in MCI locations, thus denying Cable & Wireless the ability to upgrade or expand its facilities in the future without MCI's approval? Other rights granted as part of the transfer include "projected growth requirements," but the collocation right does not. Without the right to upgrade and expand, any collocation right is valueless.

Plainly, the arrangement with Cable & Wireless does not mitigate the grave competitive risks of the merger for the Internet.[97]

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[94] *Id.*

[95] *Id.* at 6 (emphasis added).

[96] *Id.* (emphasis added).

[97] If the Commission is unwilling to determine outright that the proposed Cable & Wireless transaction is wholly inadequate, it must require disclosure of all relevant agreements or understandings underlying the proposed spin off so that the Commission

(Continued...)

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The Commission should not accept such an insufficient remedy to the serious competitive risks created by the merger for several reasons. First, the merger involves a horizontal combination of two of the leading competitors in the Internet and telecommunications markets. Second, because the Internet is expanding so rapidly, unilateral advantages in size and market power can translate into worldwide anti-competitive effects at a moments notice. Third, the Commission does not have nearly enough information about MCI's Internet business, or the proposed transaction, to accept any remedy that is not clearly sufficient on its face. In sum, the stakes are too high, and proposed solution far too weak for the Commission to allow WorldCom and MCI to merge on the basis of the proposed transaction with Cable & Wireless.

III. CONCLUSION

The highly competitive nature of today's Internet backbone market has led to astounding and rapid improvements in technology and service. The ubiquitous interconnection offered by the Internet backbone has allowed the Internet to flourish. A merger of WorldCom and MCI, however, would give one entity control of almost 50 percent or more of all Internet destinations. This control would give the merged entity the incentive and the ability to end ubiquitous interconnection in order to increase its profits and further its dominance of the backbone market.

(...Continued)
and interested parties can make a fully informed assessment.

MCI's proposal to spin off isolated facilities and non-retail customers will not decrease the danger the merger poses to the Internet. Short of a complete denial of WorldCom's and MCI's applications, only a true divestiture of UUNet will protect against anti-competitive behavior by the merged entity. Therefore, the Commission should reject the claim that the spin off of limited MCI Internet assets "clears the way" for approval of the merger, and dismiss or deny the applications. Alternatively, approval of the merger should be conditioned on the divestiture of UUNet.

Respectfully submitted,

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Appendix 1

Key Regulatory Differences Between the Telecommunications and Internet Backbone Markets

KEY REGULATORY DIFFERENCES BETWEEN THE TELECOMMUNICATIONS AND INTERNET BACKBONE MARKETS

	COMMON CARRIER REQUIREMENTS	INTERNET BACKBONE PROVIDER REQUIREMENTS

Interconnection	• Telecommunications carriers must:
	  • Interconnect with the facilities and equipment of other telecommunications carriers.
	  • Not install network features, functions, or capabilities that would interfere with connectivity. 47 U.S.C. § 251(a), 47 C.F.R. § 51.100.
	• ILECs must provide interconnection:
	  • at any technically feasible point within the carrier's network;
	  • that is at least equal in quality to that provided to itself of a subsidiary; and
	  • on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(2), 47 C.F.R. § 51.305.
		• No statutory duty to interconnect.
		• Interconnection, however, is accomplished in two principal ways:
		  (1) Bilateral agreements: large IBPs contract with each other to interconnect at private facilities.
		  (2) Public "NAPs:" smaller IBPs interconnect with other IBPs at public network access points.
		• Only competition ensures universal interconnection. A dominant IBP could refuse or condition interconnection to destroy competition.

Unbundled Elements/ Resale	• ILECs must provide any requesting telecommunications carrier nondiscriminatory access to unbundled network elements at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(3), 47 C.F.R. § 51.307. • All local exchange carriers must not prohibit, or impose unreasonable or discriminatory conditions and limitations on, the resale of its services. ILECs must offer all telecommunications services it offers to retail subscribers for resale at wholesale rates. 47 U.S.C. §§ 251(b)(1), 251(c)(4), 47 C.F.R. §§ 51.601-617.	• No statutory duty to provide unbundled elements or to permit resale of services. • IBPs agree to the equivalent of resale through peering or compensation-based agreements with other IBPs. Each IBP relies on the ability to use all other IBPs' systems to provide their customers with access to all of the Internet. • Only competition ensures access to all IBP networks. A dominant IBP could refuse or condition access to its network to improve its market position.
Access Charges/ Reciprocal Compensation	• Local exchange carriers must file access service tariffs. Access rates must be just, reasonable, and nondiscriminatory. 47 C.F.R. Part 69 • Charges for interchange of local traffic are limited to the additional costs of transport and termination. 47 U.S.C. § 252(d)(2). • Rates for all other common carrier services must also be just, reasonable, and nondiscriminatory, 47 U.S.C. §§ 201(b), 202(a), and most must still be tariffed.	• Charges for use of an IBP's network are the subject of free market bargaining (and may in effect be contained in a peering agreement). These rates are not controlled. • Only competition protects against the imposition of unreasonable charges. A dominant IBP could charge exorbitant rates to increase its competitors' costs.

Non-discriminatory Terms	• In addition to specific non-discrimination obligations (*see above* interconnection, unbundled elements, resale, collocation), common carriers have a general obligation to not unjustly or unreasonably discriminate in charges, practices, classifications, regulations, facilities, or services. 47 U.S.C. § 202.	• IBPs have no statutory duty to be nondiscriminatory in their dealings with other IBPs or customers. • IBPs can impose any terms for use of their systems. • Only competition protects against IBPs imposing unreasonable terms for interconnection or system use. A dominant IBP could impose unreasonable terms and thereby injure competition.